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In the Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

On Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. When the Federal Communications Commission issues a rulemaking order decreeing that certain FCC-prescribed accounting procedures preempt inconsistent practices of state agencies, does 47 U.S.C. §401(b) permit a private party to secure federal court enforcement of the order against a state agency that was not a party to the FCC proceeding and was not specifically ordered by the FCC to do anything?

2. When the FCC declares that state agencies must adopt certain accounting procedures for intrastate ratemaking, but asserts that its order does not inhibit other ratemaking decisions, may a federal court in a private party enforcement proceeding preclude a state agency from making a rate of return adjustment in setting rates for the company?

PARTIES IN THE COURT OF APPEALS

The parties in the court of appeals were South Central Bell Telephone Co., appellant, and the Louisiana Public Service Commission and its members, Thomas E. Powell, George J. Ackel, Ed Kennon, Louis Lambert and John F. Schwegmann (incorrectly referred to in the district court and court of appeals captions as "John G. Schwegmann, Jr"), appellees. The Federal Communications Commission appeared as *amicus curiae*.

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SUPREME COURT OF THE UNITED STATES

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LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

On Appeal from the United States
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 744 F. 2d 1107 (5th Cir. 1984). It appears in the appendix commencing at page A-l. The opinion of the United States District Court for the Middle District of Louisiana, which is reprinted in the Appendix beginning at page A-36, is reported as *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 570 F. Supp. 227 (M.D. La. 1983). The opinion of the Federal Communications Commission that was enforced by the district court and the

court of appeals is reported as *Amend. of Part 31*, 92 F.C.C. 2d 864 (1983), and is reprinted in the Appendix beginning at page A-57.

JURISDICTION

1. This is a proceeding brought by South Central Bell Telephone Co. ("South Central Bell") against the Louisiana Public Service Commission ("Louisiana Commission") to enforce an Order of the Federal Communications Commission ("FCC") pursuant to Section 401(b) of the Communications Act. 47 U.S.C. § 401(b). The FCC decided that certain accounting and depreciation practices adopted by the FCC preempted inconsistent practices used for intrastate ratemaking. *Amend. of Part 31*, 92 F.C.C.2d 864 (1983) ("*Preemption Decision*"), App. at A-57. The Louisiana Commission did not adopt the FCC-prescribed methods, and South Central Bell brought an injunction suit to enforce the *Preemption Decision*. The United States District Court for the Middle District of Louisiana ordered the Louisiana Commission to use the FCC methods for intrastate ratemaking; in a subsequent proceeding, it enjoined the Louisiana Commission from adjusting the rate of return of South Central Bell and mandated a dollar-specific rate increase. The United States Court of Appeals for the Fifth Circuit affirmed. These decisions invalidate accounting and depreciation practices of the Louisiana Commission and at least three of its ratemaking orders: *Ex parte South Central Bell Telephone Co.*, Order No. U-15445 (La. Pub. Serv. Comm'n, 1983), App. at A-99; *Ex parte South Central Bell Telephone Co.*, Order No. U-15445-A (La. Pub. Serv. Comm'n, 1983), App. at A-102: General Order, *In re reaffirmation of the applicability of state regulatory principles* (La. Pub. Serv. Comm'n, 1981), App. at A-109. In a subsequent ratemaking order, the Louisiana Commission

was forced to allow $62.7 million in intrastate rates to avoid disobedience of the *Preemption Decision* and the enforcement order. *Ex parte South Central Bell Telephone Co.*, Order No. U-15955-A (La. Pub. Serv. Comm'n, 1984), App. at A-117.

2. The decision of the United States Court of Appeals for the Fifth Circuit was rendered October 11, 1984. A notice of appeal was filed on November 16, 1984. App. at A-97.

3. The Court has appellate jurisdiction over the decision of the court of appeals pursuant to 28 U.S.C. §1254(2), which permits appeals to this Court when state laws are invalidated as repugnant to the United States Constitution. The ruling enforces the *Preemption Decision*, thereby invalidating the Louisiana ratemaking orders as repugnant to the Constitution. Ratemaking orders of a legislative nature are state "statute(s)" for the purpose of 28 U.S.C. §1254(2), which provides for appeals to this Court. *E.g., Atchinson T. & S.F. Ry. Co. v. Public Utilities Commission of California*, 346 U.S. 346, 348 (1953); *Lake Erie & Western Railroad Co. v. State Public Utilities Commission of Illinois*, 249 U.S. 422, 424 (1919). Article 4, Section 21 of the Louisiana Constitution invests the Louisiana Commission with general regulatory authority over common carriers and public utilities. The ratemaking function of the Louisiana Commission is legislative. *E.g., Gulf States Utilities Co. v. Louisiana Public Service Comm'n*, 364 So.2d 1266, 1268 (La. 1978); *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 352 So.2d 964, 969 (La. 1977).

STATUTORY PROVISIONS

The following federal statutes, set forth in the Appendix commencing at Page A-136, are involved in this case:

47 U.S.C. §152(a)
47 U.S.C. §153(i)
47 U.S.C. §153(t)
47 U.S.C. §401(b)
47 U.S.C. §413
47 U.S.C. §416(a)

The following state ratemaking orders, set forth in the Appendix commencing at page A-99, are involved in this case:

Ex parte South Central Bell Telephone Co., Order No. U-15445 (La. Pub. Serv. Comm'n, 1983).

Ex parte South Central Bell Telephone Co., Order No. U-15445-A (La. Pub. Serv. Comm'n, 1983).

General Order, *In re reaffirmation of the applicability of state ratemaking principles* (La. Pub. Serv. Comm'n, 1981).

Ex parte South Central Bell Telephone Co., Order No. U-15955-A (La. Pub. Serv. Comm'n, 1984).

STATEMENT OF THE CASE

1. This is an injunction proceeding in which a federal court ordered the Louisiana Public Service Commission, a state agency with regulatory power over telephone carriers

and other utilities in Louisiana, to increase the intrastate telephone rates of South Central Bell Telephone Co. by more than $40 million. A preliminary injunction was issued by the United States District Court for the Middle District of Louisiana ("district court") to require the Louisiana Commission to "obey" a ruling of the Federal Communications Commission, which held that certain FCC-prescribed accounting practices preempted inconsistent state practices ("*Preemption Decision*"). The district court not only invalidated the accounting practices traditionally used by the Louisiana Commission, but overruled a rate of return determination made by the Louisiana Commission when it adopted the FCC accounting procedures. The Louisiana Commission appealed and the United States Court of Appeals for the Fifth Circuit ("court of appeals") affirmed.

2. In 1980, the FCC amended its accounting rules to give carriers the option of adopting two depreciation practices permitting faster capital recovery: the "equal life group" and "remaining life" methods. *Amend. of Part 31*, 83 F.C.C.2d 267 (1980) ("*Depreciation Order*"). In 1981, the FCC ruled that carriers should expense rather than capitalize their station connection costs. *Amend. of Part 31*, 85 F.C.C.2d 818 (1981) ("*Expensing Order*"). The FCC was requested to clarify that the *Expensing Order* did not limit the discretion of state agencies in fixing intrastate rates. In 1982, it ruled that "state commissions are not precluded from using their own accounting and depreciation procedures for intrastate ratemaking ...." *Amend. of Part 31*, 89 F.C.C.2d 1094, 1095 (1982). The FCC pointed out that state agencies had always been free to depart from FCC-prescribed procedures for intrastate ratemaking and that these departures received judicial approval. *Id.* at 1106-07. Thus, it held, a decision to preempt state practices would "repudiate nearly forty years of administrative

practice and applicable state court precedents ...." *Id.* at 1107.

The American Telephone & Telegraph Co. ("AT&T") sought reconsideration of the FCC decision and General Telephone Co. of Ohio petitioned for an order preempting depreciation practices of the Ohio Public Utilities Commission. On reconsideration the FCC decided that Section 220(b) of the Communications Act after all preempts state accounting practices that are inconsistent with the *Expensing Order* and *Depreciation Order*. It said: "We find that the most logical and reasonable interpretation of Section 220(b) of the Act is that where the Commission prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates." *Preemption Decision*, 92 F.C.C.2d at 879, App. at A-82. Alternatively, the FCC stated "that inconsistent depreciation rates will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies," and were therefore preempted. *Id.* at 880, App. at A-83.

The ordering clauses of the *Preemption Decision* 1) granted the petition for reconsideration of AT&T, 2) granted the petition for declaratory ruling of GTE of Ohio, 3) provided for publication of the *Preemption Decision* in the Federal Register, and 4) directed that the order be served on each state commission. *Id.*, App. at A-84. The *Preemption Decision* contained no ordering clause telling any state commission to do anything. *Id.*, App. at A-84. The Louisiana Commission was not a party to the proceeding before the FCC.

The Virginia State Corporation Commission sought review of the *Preemption Decision* in the United States

Court of Appeals for the Fourth Circuit. The Louisiana Commission intervened in the Fourth Circuit appeal after the injunction suit was filed in the district court to enforce the *Preemption Decision*. A number of state regulatory agencies, consumer counsel and other officials also intervened. By a 2-1 majority, the court of appeals affirmed the *Preemption Decision*, relying only on the asserted affirmative regulatory power of the FCC to preempt inconsistent state ratemaking practices. *Virginia State Corporation Comm'n v. Federal Communications Comm'n*, 737 F.2d 388, 392-96 (4th Cir. 1984). The Louisiana Commission has appealed the ruling of the Fourth Circuit.

3. As the FCC recognized in its initial decision, state agencies had always been free to follow their own practices for intrastate ratemaking. Judicial and administrative decisions unanimously held that the power reserved to the states in the Communications Act permitted state regulators to make their own ratemaking decisions. *E.g.*, *Pacific Telephone and Telegraph Co. v. Public Utilities Commission of California*, 401 P.2d 353, 372-73 (Cal. 1965); *In re Northwestern Bell Telephone Co.*, 43 N.W.2d 553, 557 (N.D. 1950); *Re Southern Bell Telephone and Telegraph Co.*, 66 PUR 3d 1, 58 (Fla. Pub. Serv. Comm'n, 1966); *Re New England Telephone & Telegraph Co.*, 35 PUR 3d 100, 104 (Vt. Pub. Serv. Comm'n, 1960). Moreover, the uniform accounting systems prescribed by federal agencies have never been viewed as binding for ratemaking, even on the prescribing agencies. *Alabama-Tennessee Natural Gas Co. v. Federal Power Comm'n*, 359 F.2d 318, 336 (5th Cir. 1966) ("The short answer is that accounting for tax purposes and even the Commission's Uniform System of Accounts may be valuable tools, but they cannot dictate ratemaking policies."); *American Telephone & Telegraph Co.*, 64 F.C.C.2d 1, 56-60, 62, 68 (1977); *see American Telephone &*

Telegraph Co. v. United States, 299 U.S. 232 (1936). Therefore, a number of state agencies declined to adopt the FCC-prescribed accounting practices for intrastate ratemaking.

Relying on the *Preemption Decision*, telephone companies across the nation brought injunction proceedings in federal courts to force their state regulators to grant higher rates. These actions were brought pursuant to Section 401(b) of the Communications Act, 47 U.S.C. §401(b), as suits "for the enforcement" of an FCC order against parties "in disobedience" of the order. In three suits that were largely paper proceedings conducted under restrictive time constraints, federal courts ruled that this section provided jurisdiction to federal courts in private party suits against the Washington, Maryland and Kansas commissions. *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Comm'n*, 565 F.Supp. 17 (W.D. Wash. March 10, 1983), *appeal pend'g* No. 83-3746 (9th Cir.); *Chesapeake & Potomac Telephone Co. v. Public Service Commission of Maryland*, 560 F.Supp. 844 (D. Md. Apr. 7, 1983), *appeal pend'g* No. 83-1403 (4th Cir.); *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas*, No. 83-4090 (D. Kan. Apr. 8, 1983). Armed with these precedents, telephone companies obtained injunctions against the ratemaking agencies of Louisiana, Maine, Arkansas and Iowa. *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 570 F.Supp. 227 (M.D. La. 1983), *aff'd* 744 F.2d 1107 (5th Cir. 1984); *New England Telephone Co. v. Public Utilities Commission of Maine*, 570 F. Supp. 1558 (D. Me. 1983), *rev'd* 742 F.2d 1 (1st Cir. 1984); *Southwestern Bell Telephone Co. v. Arkansas Public Service Comm'n*, 738 F.2d 901 (8th Cir. 1984), *cert. pend'g*, No. 84-483 (U.S.); *Northwestern Bell Telephone Co. v. Iowa State Commerce Comm'n*, No.

83-688-A (S.D. Iowa 1984). An injunction was denied in Vermont and an injunction application is pending in Wisconsin. *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F.Supp. 490 (D. Vt. 1984), *appeal pend'g* No. 84-7051 (2d Cir.); *Wisconsin Bell, Inc. v. Public Service Commission of Wisconsin*, No. 84-C-0004 (D. Wisc.).

This spate of lawsuits marked the first time that 47 U.S.C. §401(b) was ever used by private parties against state public service commissions. Regulated utilities obtained federal court injunctions to force their state regulators to raise intrastate rates to comply with depreciation policies implemented by these companies pursuant to the permission of the FCC. In the case of the FCC-approved depreciation practices, the procedures for faster capital recovery were not even required by the FCC, but are utilized by carriers at their option. *Depreciation Order*, 83 F.C.C.2d 267 (1980). Thus, state regulators have been enjoined to raise rates to accommodate the choices made by regulated utilities.

The federal courts are divided concerning the propriety of allowing private party suits against state commissions pursuant to Section 401(b). As noted above, a number of district courts and the Fifth and Eighth Circuits have approved this action. The Eighth Circuit decision reversed a district court order that denied an injunction on the ground that the *Preemption Decision* was *ultra vires*. *Southwestern Bell Telephone Co. v. Arkansas Public Service Comm'n*, 584 F.Supp. 1087 (D. Ark.), *rev'd* 738 F.2d 901 (8th Cir. 1984), *cert. pend'g* No. 84-483 (U.S.). The First Circuit held that federal court enforcement of the *Preemption Decision* is improper because a rulemaking decision is not an "order" in the sense contemplated by Section

401(b). *New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984). The district court in Vermont ruled that a state commission is not a "person" against whom an FCC order can be enforced under the statute. *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F.Supp. 490 (D. Vt. 1984), *appeal pend'g* No. 84-7051 (2d Cir.).

4. This proceeding arose when the Louisiana Commission denied a request of South Central Bell for an intrastate rate increase. After making the appropriate ratemaking adjustments, the Louisiana Commission found that the revenues of South Central Bell were sufficient to produce the rate of return allowed in its previous rate case, and an increase was unnecessary. The Commission did not make a finding of the fair rate of return for the company. *Ex parte South Central Bell Telephone Co.*, Order No. U-15445 (La. Pub. Serv. Comm'n, 1983), App. at A-99.

South Central Bell did not appeal any aspect of the ratemaking order to the state courts. It filed an injunction suit in the district court, however, contending correctly that the Louisiana Commission had not adopted the accounting practices approved by the FCC. The district court refused to examine the propriety of the *Preemption Decision* and rejected the argument that the *Preemption Decision* could not be enforced pursuant to Section 401(b). The district court ordered the adoption of the FCC procedures, but refused to mandate a dollar-specific rate increase, stating that "[w]hile depreciation schedules are an important factor in rate making, they are only one factor among many ...." 570 F.Supp. at 234, App. at A-47. The district court required the Louisiana Commission "to set new rates within ten days utilizing F.C.C. policies and rates." *Id.*,

App. at A-47.

Because of the 10 day limitation, the Louisiana Commission was unable to order the preparation and filing of additional evidence or to conduct additional rate hearings. *Cf.* La. Pub. Serv. Comm'n. R.19 (10 day notice requirement for most cases). The case was reconsidered on the basis of the record originally compiled by the Louisiana Commission. The Louisiana Commission implemented the FCC accounting procedures and determined that these practices increased intrastate operating expenses by about $40.5 million. Because these changes apparently required a rate increase, the Louisiana Commission proceeded to examine the fair rate of return issue. It found that a rate of return on equity of 12 percent was sufficient. The Commission ordered a rate increase of $12.7 million to produce this rate of return, after allowing for the $40.5 million in increased expense. *Ex parte South Central Bell Telephone Co.*, Order No. U-15445-A (La. Pub. Serv. Comm'n, 1983), App. at A-102.

South Central Bell returned to the district court, requesting an injunction ordering a dollar-specific rate increase and, alternatively, a holding that the Commission was in contempt. The district court took no evidence in connection with this motion, but accepted memoranda and heard argument. South Cental Bell argued in its memorandum that the rate of return finding was "arbitrary and capricious," in violation of state ratemaking authorities. (R., Supp. Memo. in Support of Motion to Modify Order, etc. at 7-8). The company attempted to introduce evidence on the issue of motivation: a transcript assertedly prepared from a radio station recording of the Louisiana Commission meeting. The district court rejected this evidence, stating "you look at what they did as opposed to the

individual comments or motives, even, of the people who make up the quasi-legislative body...." (R., 7/29/83 at 45). South Central Bell was permitted to attach the transcript to a memorandum.

The *Preemption Decision* states that it "only prohibits the states from setting depreciation rates" that are inconsistent with FCC practices; it disclaims any intent to require the state commissions to accept particular tariffs. *Preemption Decision*, 92 F.C.C. 2d at 874, App. at A-74. In addition, the FCC was represented at the argument on the motion to modify the injunction; its deputy associate general counsel was questioned by the district court. When asked if the FCC was interested in an order mandating a specific increase, counsel stated:

> MR. INGLE: No, sir, we're not interested in the specific numbers. I think we would see an appropriate order in this case as one which enjoins the Louisiana Commission—perhaps, in some rather vague sense—to issue a rate order which, whatever else it does, follows and obeys the FCC's depreciation rules as established in the substantive orders that have preemptive effect as a result of the preemption order.
>
> (R., 7/29/83, at 40-41).

The district court ordered a specific rate increase of $40.5 million. It found that the Louisiana Commission was "arbitrary and capricious" in adjusting the rate of return, relying in part on the fact that no new evidence was received. 570 F. Supp. at 238, App. at A-55. The district court stated it would "not become involved in the rate making process and that intrastate rate making is still within the exclusive province of the states." 570 F. Supp. at 237, App.

at A-53. The district court overruled the ratemaking determination of the Louisiana Commission and ordered the increase "since this court will not engage in rate making ...." 570 F.Supp. at 238, App. at A-56.

The court of appeals affirmed. It rejected the argument that Section 401(b) does not authorize a private party injunction suit to enforce the *Preemption Decision* against a state commission, specifically refusing to follow the First Circuit decision in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984). The court of appeals also rejected the contention that the district court could not overrule the rate of return determination of the Louisiana Commission in enforcing the *Preemption Decision*.

On the rate of return issue, the court of appeals did not accept the district court's reasoning that the dollar-specific injunction did not involve ratemaking. 744 F. 2d at 1124, App. at A-32. Instead, it affirmed on the basis of two determinations it read into the district court's decision. First, it ruled that the district court "necessarily had to" interpret the *Preemption Decision* as precluding the Louisiana Commission from lowering the rate of return. *Id.* at 1122, App. at A-27. This interpretation was perceived in the district court opinion and adopted by the court of appeals, although the *Preemption Decision* states that it only applies to depreciation practices and counsel for the FCC had expressly declined to recommend that the rate of return determination be overruled. *See Preemption Decision*, 92 F.C.C.2d at 874, App. at A-74; (Tr., 7/29/83 at 40-41).

Second, the court of appeals found that the district court "necessarily had to" find that the Louisiana Commission adjusted the rate of return "other than for a valid

reason." 744 F.2d at 1122, App. at A-28. This determination of motivation was not made by the district court, which instead relied on an "arbitrary and capricious" standard in overturning the rate of return ruling. 570 F.Supp. at 238, App. at A-55. Indeed, the district court disclaimed any interest in the issue of motivation, rejecting the only evidence offered on the point. (Tr. 7/29/83 at 43-45).

The Louisiana Commission argued to the court of appeals that the $40.5 million increase in the cash flow of South Central Bell reduced the risk of the company, making a lower rate of return appropriate. The court of appeals relied on the perceived factual finding of ill motive and determined that the lessened risk was not the real reason for the rate of return adjustment. Since this asserted "finding" was not "clearly erroneous", the court of appeals upheld the rate of return decision of the district court. 744 F.2d at 1124.

THE QUESTIONS ARE SUBSTANTIAL

This case presents important issues relating to an unprecedented eruption of injunction suits brought by telephone companies against state public service commissions pursuant to 47 U.S.C. §401(b). This statute, which provides a means of enforcing orders of the FCC, was never intended to authorize suits against state agencies. The injunction suit in this case was not authorized because a state commission is not a "person" subject to the regulatory jurisdiction of the FCC and the *Preemption Decision* is not an "order" within the meaning of the statute. On these issues, conflicts exist in the decisions of the lower federal courts. In addition, the rate of return ruling of the district court was an unauthorized foray into intrastate ratemaking, beyond that necessary to enforce the

Preemption Decision. South Central Bell had a full and effective remedy in the state courts on both of these issues. Because the questions are substantial, the Court should give them plenary consideration.

A. *Section 401(b) Does not Authorize a Private Party Injunction Proceeding to Require a State Ratemaking Agency to Abide by the Preemption Decision.*

Federal courts generally do not have jurisdiction to review the constitutionality of state ratemaking orders; these cases are usually heard in state courts. In this case, however, the court of appeals held that jurisdiction existed pursuant to Section 401(b) to enforce the *Preemption Decision* against the Louisiana Commission. This ruling is erroneous. Section 401(b) was never intended to permit injunction suits by regulated utilities against state agencies to obtain higher rates. The express language of this provision permits enforcement only against those parties regulated by the FCC. Morever, even if a state agency could be a defendant in a suit under Section 401(b), the *Preemption Decision* is not the type of "order" that can be enforced pursuant to this provision. Therefore, the ruling of the court of appeals is erroneous.

As a matter of general policy, Congress has ordained that state ratemaking issues be kept out of federal courts. Thus, the Johnson Act, 28 U.S.C. §1342, precludes the federal courts from enjoining state ratemaking decisions when 1) jurisdiction is based on diversity or a claim that the rate order is unconstitutional; 2) the order does not interfere with interstate commerce; 3) the order was made after reasonable notice and a hearing; and 4) there is a plain and efficient state court remedy. This provision has

been construed repeatedly as intended to channel rate litigation into the state courts. *Gulf Water Benefaction Co. v. Public Utility Commission of Texas*, 674 F.2d 462 (5th Cir. 1982); *Tennyson v. Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974). Even when the Johnson Act is technically not applicable, the policy against federal court interference in intrastate ratemaking may require federal abstention when there is an adequate state court remedy. *Alabama Public Service Comm'n v. Southern Railway Co.*, 341 U.S. 341 (1951).

South Central Bell had a plain, speedy and effective avenue to obtain state court review of the ratemaking order of the Louisiana Commission. La. Const. Art. IV, §21(D); La. R.S. 45:1192. The Louisiana courts could have considered the preemption issue along with any other argument raised by South Central Bell; these courts would have had jurisdiction over the rate of return issue that ultimately arose. Typically, the preemptive effect of federal agency orders has been determined in the ratemaking context by the state courts. The *Narragansett* doctrine, the preemption doctrine under which state ratemaking agencies must accept certain operating costs of utilities when they have already been approved in a rate case by the Federal Energy Regulatory Commission, is a state court doctrine. *E.g.*, *Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977); *United Gas Corp. v. Mississippi Public Service Comm'n*, 127 So.2d 404 (Miss. 1961).

While South Central Bell and other telephone companies could litigate the effect of the *Preemption Decision* in the state courts, they would not have had a forum in which the courts deemed themselves powerless to decide its validity. The Louisiana Commission and other state agencies would have been able to argue that the *Pre-*

emption Decision is *ultra vires.* The state courts could have determined, on the merits, whether Section 220(b) of the Communications Act or the *Preemption Decision* itself preempts state ratemaking policies that are inconsistent with accounting practices prescribed by the FCC, giving the state agencies the benefit of a full hearing.

Instead of seeking relief in the state courts, South Central Bell and other telephone companies chose to use Section 401(b), characterizing their injunction suits as enforcement proceedings. The outbreak of lawsuits in the federal courts marked the first time that this provision has been used against state commissions. This use of Section 401(b) for the enforcement of the *Preemption Decision* was improper.

First, Section 401(b) does not apply to state commissions. It provides:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money ... any party injured hereby ... may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of same, the court shall enforce obedience to such order ....

This provision does not apply to state commissions. The word "person" is defined in Section 3(b) of the Communications Act as "an individual, partnership, association, joint-stock company, trust, or corporation"; "state commission" is defined in a separate paragraph. 47 U.S.C. §153(i), (t), App. at A-136. Moreover, Section 2 of the Act, which determines its reach, makes clear that the statute applies to

"persons" who *are carriers*. It states in part: "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio ... and to all persons engaged within the United States in such communication ...." 47 U.S.C. §152(a), App. at A-136. A split of authority exists in the lower courts on the issue of whether Section 401(b) applies to state commissions. *See New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F.Supp. 490 (D. Vt. 1984), *appeal pend'g* No. 84-7051 (2d Cir.).

Other provisions in the Communications Act establish that Congress did not intend to authorize a rash of suits against state commissions to raise the intrastate rates of telephone companies, in which federal courts enforce an FCC order while proclaiming themselves powerless to examine its validity. The Communications Act instead provides for cooperation between the FCC and state agencies, including the formation of joint boards to deal with matters of mutual concern. *E.g.* 47 U.S.C. §410. Moreover, the Communications Act provides for personal service of orders of the FCC on carriers; it makes no provisions for service on state commissions. 47 U.S.C. §§413, 416(a). In this case, a general administrative mailing was deemed the due service required by Section 401(b). 744 F. 2d at 1121, App. at A-26.

Second, the *Preemption Decision* is not an "order" enforceable pursuant to Section 401(b). The *Preemption Decision* was adopted in a rulemaking proceeding in which the Louisiana Commission was not a party. *Preemption Decision*, 92 F.C.C. 2d 864 (1983), App. at A-57. The ruling is legislative in nature, setting forth a rule of general applicability. This type of "order," in contrast to an adjudicative order, is not a proper basis for an "enforcement"

proceeding. Instead, the preemptive effect of the *Preemption Decision* should be litigated in state courts. On this point, there is a conflict in the decisions in the circuits. *Compare* the decision of the court of appeals, 744 F.2d at 1117-20, App. at A-17—A-23, *with New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 4-9 (1st Cir. 1984).

The *Preemption Decision* is also not enforceable because it is general and declaratory in nature. The ruling does not direct the Louisiana Commission or any other state commission to do anything. The *Preemption Decision* is analogous to a case in which a court expresses a view as to the rule of law on a given issue. The decision theoretically would be binding as a rule of law on everyone in the jurisdiction, but enforcement proceedings could be brought only against a party in the case who violated a specific order of the court. Similarly, FCC orders should be enforceable only against parties or persons specifically ordered to take a prescribed action.

The interpretation given Section 401(b) by the court of appeals raises important questions. The spectre of an eruption of federal court injuction suits brought by private parties against state officials to increase intrastate rates creates significant federal-state tensions. This strain is increased when the federal courts enforce an order against agencies that were not parties to the proceeding in which the order was issued, and the courts refuse to examine the substantive validity of the order. Congress did not intend that Section 401(b) be used against state commissions, especially when the complaining parties have effective state court remedies. The Court should give these issues plenary consideration.

B. *The Dollar-Specific Rate Injunction, Overruling the Rate of Return Decision of the Louisiana Commission, Was Beyond the Authority of the District Court Under Section 401(b).*

Two orders were issued by the district court. The first required compliance with the depreciation practices prescribed by the FCC; the Louisiana Commission complied in full with this injunction by recognizing $40.5 million in additional intrastate expense. 570 F.Supp. at 235, App. at A-54; *Ex parte South Central Bell Telephone Co.*, Order No. U-15445-A (La. Pub. Serv. Comm'n., 1983), App. at A-102. When the Louisiana Commission adjusted the rate of return and granted a rate increase of $12.7 million, the district court overruled this action as arbitrary and capricious and required adherence to a previously-authorized rate of return. 570 F.Supp. at 237-38, App. at A-55—A-56. Even if Section 401(b) permits the enforcement of the *Preemption Decision*, this second ruling exceeds the scope of the *Preemption Decision* and is unauthorized by Section 401(b).

Section 401(b) does not permit the federal courts to review ratemaking decisions that are beyond the scope of the FCC order being enforced. This section only allows the "enforcement of such order." Since the FCC twice disclaimed interest in any issue other than its accounting practices, it was improper to overrule the rate of return determination.

The FCC avoided the argument that the *Preemption Decision* constitutes intrastate ratemaking by stating that its ruling "only resolves a single issue impacting the ratemaking process." *Preemption Decision*, 92 F.C.C.2d at

874, App. at A-74. The FCC indicated that its order "only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions." *Id.*, at A-74. Counsel for the FCC expressly disclaimed interest in a dollar-specific injunction in argument to the district court. (Tr., 7/29/83, 40-41). The FCC never suggested that the *Preemption Decision* could bind a state commission to a previously authorized rate of return.

The strained reading of the district court's opinion by the court of appeals does not justify the rate of return injunction. In fathoming a district court interpretation that the *Preemption Decision* precludes ratemaking adustments that offset increased depreciation expense, the court of appeals not only misstated the reasoning of the district court, but ran afoul of one fear expressed by the First Circuit in declining to approve Section 401(b) enforcement: that placing interpretive power in the hands of private parties and some 700 federal district judges" could be troublesome. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 6 (1st Cir. 1984). The interpretation of the court of appeals conflicts with the FCC interpretation of its own ruling, as expressed in the *Preemption Decision*, and the statements of counsel for the FCC.

In discerning a "finding of fact" that the ruling of the Louisiana Commission was ill-motivated, the court of appeals ignored the district court's statement that motivation was irrelevant; it also sidestepped the absence of an evidentiary hearing on the point. (Tr., 7/29/84 at 45), 744 F.2d at 1124 n.27 (relying on attachments to briefs, although the key attachment was excluded from evidence).

In any event, the court of appeals' preoccupation with motivation violates the rule that courts should examine the *result* in agency rulings, not the motivations of the decision makers. Because the issue arose in an "enforcement" proceeding, the Louisiana Commission was not even given the the benefit of this rule, which is universally followed in the federal system in suits to review agency decisions. *E.g., In Re Permian Basin Area Rate* Cases, 390 U.S. 747, 775 (1968); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

The decision of the Louisiana Commission was justified. The huge increase in the cash flow of South Central Bell substantially reduced its risk; the $40.5 million in advanced capital recovery was nearly sufficient to pay all the interest charges on the intrastate debt of the company. The reduction in risk permitted a lower rate of return. The relationship of capital recovery and risk was recently recognized by the Maine Public Utilities Commission, which lowered the rate of return after being ordered to recognize the FCC-prescribed depreciation. It held that "no change can be made to depreciation without a reappraisal of the return on equity as well." *New England Telephone and Telegraph Co.*, Docket No. 82-124 (Maine Pub. Util. Comm'n, 1983).

The Louisiana Commission did not receive *new* evidence in the 10 day period allowed for compliance with the district court's injunction, but it had before it the entire record in the rate case. The rate of return decision could not be evaluated without analyzing this evidence, yet the district court found the Louisiana Commission "arbitrary and capricious" without even looking at the record.

The proper forum for review of the rate of return decision was the state court, where the result could be evaluated in the light of all the evidence. The injunction proceeding in this case, with its short deadlines and the court of appeals' preoccupation with motivation, did not permit a thorough and objective analysis of the result. The *Preemption Decision* did not require the state commissions to freeze previously allowed rates of return. Therefore, the rate of return injunction was not authorized by Section 401(b).

CONCLUSION

Every aspect of this case strains federal-state relations. Section 401(b) was used by the telephone company against its state regulators in a manner unauthorized by the statute and never contemplated by Congress. The Louisiana Commission was enjoined to raise intrastate rates on the basis of a rulemaking decision issued in a proceeding in which the state agency did not participate, without an opportunity in the enforcement proceeding to litigate the merits of the decision. The Louisiana Commission was also prevented from adjusting the intrastate rate of return of the telephone company, although the FCC ruling being enforced disclaims any intention to preclude this kind of adjustment. The outbreak of injunction suits brought pursuant to Section 401(b) has produced con-

flicting decisions in the lower courts. The Court should give these issues plenary consideration.

Respectfully Submitted,

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